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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 143

MYER KLIG,

Petitioner

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

BRIEF FOR PETITIONER

JACK WASSERMAN,
DAVID CARLINER,
902 Warner Building,
Washington 4, D. C.,
Attorneys for Petitioner.

WASSERMAN AND CARLINER,
Of Counsel.

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Opinions Below

The opinion of the District Court is unreported (R. 37-39). The opinion of the Court of Appeals is reported at 244 F. 2d 742 (R. 47-61).

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the legality of an alien's entry into the United States is to be measured by the law in effect at the time of such entry where Congress has not manifested a direction to the contrary.

2. Whether an alien who was a former member of the Canadian Communist Party when he entered the United States in 1941 and 1945 for permanent residence is subject to deportation:

(a) Where it is conceded that on this record he entered lawfully under the law existing in 1941 and 1945.

(b) Where there is no proof in the administrative record that the Canadian Communist Party advocated the overthrow of all forms of law or of the Government of the United States.

(c) Where deportation proceedings were instituted in 1947 upon the basis of such past membership outside the United States.

3. Whether an alien who last entered the United States in 1945 can be deported under a statute enacted more than five years later—the Internal Security Act of 1950 (8 U.S.C. 137-3, Supp. IV, 1946 Ed.)—upon the ground that he was excludable in 1941 or 1945 upon the basis of former membership in the Canadian Communist Party prior to 1932.

4. Whether the exclusion provisions of the Internal Security Act of 1950 (8 U.S.C. 137 Supp. IV, 1946 Ed.) are prospective or retrospective.

Statutes Involved

Section 22 of the Internal Security Act of 1950 (64 Stat. 1006; 8 U.S.C. 137, 137-3 Supp. IV, 1946 Ed.) amended the Anarchist Act of October 16, 1918 (40 Stat. 1012) and the Alien Registration Act of 1940 (54 Stat. 673) to read as follows:

(The Exclusion Section)

[Sec. 1, 8 U.S.C. 137]. Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

(1) Aliens who seek to enter the United States . . . to engage in activities which would be prejudicial to the public interest . . .

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

(A) Aliens who are anarchists; . . .

* * * * * * *

(C) Aliens who are members of * * * the Communist or other totalitarian party of * * * any foreign state * * *

* * * * * * *

(H) * * * * * * *

(The Deportation Section)

[Sec. 4a, 8 U. S. C. 137-3]. Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

The Anarchist Act of October 16, 1918 (40 Stat. 1012) as amended by the Alien Registration Act of 1940 (54 Stat. 673) and as set forth in 8 U.S.C. 137 (1946) Ed. provided:

[Sec. 1] Any alien who, at any time shall be or shall have been a member of any one of the following

classes shall be excluded from admission to the United States:

* * * * * * *

(C) Aliens who * * * are members of * * * any organization * * * that believes in, advises, advocates or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law * * *.

[Sec. 2]. Any alien who was at time of entering the United States or has been at any time thereafter, a member of any one of the classes of aliens enumerated in Section 1 of this Act shall upon warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

Statement

Petitioner, a native of Russia, was lawfully admitted to the United States for permanent residence on April 2, 1941, and was thereafter readmitted as a returning resident on December 18, 1945. Prior to July, 1932, he was a member of the Communist Party of Canada (Pre-Trial Memorandum, R. 22). His membership lasted from 1929 to 1932. He has been a person of good moral character and his record is otherwise without blemish (R. 46).

On February 5, 1947, deportation proceedings were instituted against petitioner upon the ground that, prior to entry, he had been an alien affiliated with an organization that believes in unlawful damage, injury, or destruction of property (R-41). That charge was not sustained (R-41).

Instead, the Board of Immigration Appeals sustained a lodged charge, based upon the subsequently-enacted Internal Security Act of 1950, namely, that the petitioner was an alien who, prior to entry, was a member of the Communist Party of Canada (R-40-43).

Petitioner was not charged with being deportable for having been a member at the time of entry of a class excluded by law. Cf. Sec. 19(a) of the Immigration Act of 1917, 39 Stat. 874, 8 U.S.C. 155 (R-41). Nor was there proof in the administrative hearing in support of such a charge (R-41-43). Respondent has conceded here that there was no proof as to the nature of the Communist Party of Canada in the period of the petitioner's membership[1] and that it did not argue below that he is deportable because he was shown to be excludable at the time of entry. (Memorandum on Petition for Writ of Certiorari 5-6 at Note 2.)

The Board, however, ruled (R-43):

> "When the respondent (the petitioner herein) entered the United States in 1941 and 1945 he was excludable because of his past membership in a proscribed organization."

The complaint herein alleges (R. 18, par. 21) and the answer admits (R. 21, par. 21) that:

> "The Board of Immigration Appeals ordered plaintiff's deportation upon his past membership in the Communist Party of Canada *solely on the ground that he violated the Internal Security Act of 1950 at the time*

[1] Which presumably might have established that it is an organization which advocates the violent overthrow of the United States Government, and thus within the ban of Section 1(2)(C) of the Anarchist Act of 1918 as amended by the Act of June 28, 1940 (8 U.S.C. 137; 1946 ed.).

he entered the United States in 1945." (Emphasis supplied)

The District Court likewise reasoned that petitioner was excludable in 1941 and 1945 pursuant to the law existing in 1950 (R. 39). The District Court acknowledged that the Fifth Circuit Court of Appeals had held under similar circumstances that an alien was not deportable, *Berrebi* v. *Crossman*, 208 F. 2d 498 (C.A. 5, 1953). Nevertheless, the complaint was dismissed on the theory that the Internal Security Act of 1950 (8 U.S.C. 137-3, Supp. IV, 1946 Ed.) required the deportation of aliens who were past members of the Communist Party outside the United States prior to 1950. The Court of Appeals affirmed by a divided vote. It rejected the *Berrebi* case (R. 47, 54) and held that although the record did not support excludability in 1941 and 1945 under the law then existing, the Internal Security Act of 1950 did, thus rendering petitioner deportable.

Judge Washington dissented, stating (R. 56, 57, 61):

> "Under present law, an alien is deportable if he 'at the time of entry was within one or more classes of aliens excludable by the law existing at the time of such entry.' 8 U.S.C. 1251 (a)(1), (1952) or its predecessor 8 U.S.C. 155(a) (1946).
>
> * * * * * * *
>
> "Congress had indicated that Communist Party membership will be considered grounds for deportation only if it occurred after entry, while the alien was enjoying United States residence. Of course, Congress may sometime say that membership before entry is a ground for deportation. But until it does so, I find no basis for holding this alien deportable. On the contrary, I think that Congress has specifically provided that he is *not* deportable."

Summary of Argument

It is conceded that on this record, the petitioner has not been shown to have been excludable from admission to the United States at the time of his entries in 1941 and 1945. In order to sustain deportation, therefore, the respondent must establish that the petitioner is a member of a *deportable* class as provided in the Anarchist Act of 1918 as it has been successively amended by the Alien Registration Act of 1940 and the Internal Security Act of 1950, the statute under which the deportation charge was lodged and upheld.

The deportation section of the statute, as amended, provides explicitly that only those aliens shall be deportable who were *at the time of entry or thereafter* of the proscribed classes. It is true that in the exclusion section of the statute, aliens were to be excluded who, at any time shall be or shall have been members of the proscribed classes. But no claim is made by the respondent that the petitioner's entries to the United States were made in violation of the statute at the time of his entry, or that the Internal Security Act's amendments, adopted five years after petitioner's last entry, apply retrospectively to transform his lawful admission into an illegal entry.

The claim that is made, and which was adopted by the majority below, is that the enumeration of proscribed classes in the exclusion section of the statute incorporates within the enumerated classes the prefatory language specifying the time period of the membership. With this construction, the petitioner is therefore defined to be a deportable alien.

Not only does a grammatical analysis of the statute show that this construction is untenable, but the clear legislative history of the clause which the respondent relies upon shows that it was not the intent of Congress to adopt the same criteria for deportation as it did for exclusion. Proof of

this is dramatically shown by the fact that the original version of the Alien Registration Act of 1940, H.R. 5138, 76th Cong., 1st Sess., did have this as its purpose. But after the bill had passed the House and been favorably reported by the Senate, the report was withdrawn, the bill rewritten. Congress was advised in unmistakable language that the original provisions were changed "to prevent hardship on aliens who may have, in the distant past, but who had renounced before coming to the United States, their membership in such classes."

The Congressional purpose to save from deportation aliens who are in the petitioner's position, is made the more eloquent by the fact that in that very legislation Congress did reach for deportation those aliens who had in the past belonged to proscribed organizations *after* entry to the United States.

Finally, it is conceded that the petitioner, who admittedly could not be deported prior to the Internal Security Act of 1950, cannot be deported under the Immigration and Nationality Act of 1952. To hold that Congress sought to equate deportability with excludability during the two-year period between the 1950 Act and the 1952 Act is to read a harsh incongruity in the Congressional purpose which this Court has often cautioned should be avoided in construing deportation legislation.

ARGUMENT

I. The Explicit Language of the Controlling Statute Establishes That Petitioner Is Not Deportable for Former Membership in a Subversive Organization Outside the United States Prior to His Entry.

The validity of the order to deport the petitioner turns upon whether the Internal Security Act of 1950 establishes the same criteria for deportation as it does for exclusion.

See dissenting opinion, *Rowoldt* v. *Perfetto*, No. 5, October Term, decided December 9, 1957.

Respondent and the majority holding of the Court below equate the two. Petitioner, the dissenting opinion below, and the ruling of the Circuit Court of Appeals for the Fifth Circuit in *Berrebi* v. *Crossman*, 208 F. 2d 498 (1953) believe that the unambiguous language of statute establishes one standard for exclusion but another standard for deportation, and that the legislative history of its relevant language supports this conclusion.

The question depends upon a construction of two clauses contained in Section 22 of the Internal Security Act.

The first clause is subsection 4(a) which provides:

> "Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall upon warrant of the Attorney General, be taken into custody and deported.

The second clause, insofar as pertinent here, provides:

> "[*Sec. 1*] Any alien who is a member of any one of the following classes shall be excluded from admission to the United States:
>
> (1) * * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> (A) * * * * * *
>
> (B) * * * * * *
>
> (C) Aliens who are members of . . . the Communist . . . party . . . of any foreign state . . .
>
> * * * * * * *
>
> (H) * * * * * *
>
> (3) * * * * * * *"

A simple parsing of the two clauses indicates that the majority holding below is in error.

Section 4(a) refers to "classes enumerated" in Section 1(2). The *enumerated* classes are set forth alphabetically from (A) to (H) in that section. To include the preamble which precedes the enumeration would clearly go beyond the explicit language contained in Section 4(a). Section 1(2) itself refers to the categories of aliens set forth in paragraphs (A) to (H) as *following classes*. Its own phrase sets forth an enumeration of *classes* of aliens apart from its prefatory language.

Moreover, the syntax of the clauses demonstrates that the majority view is erroneous. With its construction, the statute builds time clause unnecessarily upon time clause and reads turgidly thus:

> "Any alien who was at the time of entering the United States, or has been thereafter, a member of (a class of) aliens who, at any time shall be or shall have been members of any of the following classes:
>
> "Aliens who are members of the Communist Party of any foreign state."

Had Congress intended to achieve the end which the majority below imputes to it, the language in the statute could have followed word for word the phrasing Congress adopted for the exclusion section. It could have stated simply and clearly in Section 4(a) that "aliens who, at any time, shall be or shall have been members of the classes enumerated in Section 1(2) of this Act shall be deported."

The fact that Congress chose to use the phrase "*at any time shall have been*" in the exclusion section of the statute, but in the deportation section used in its stead the phrase "*was at the time of entering . . . or has been at any time thereafter*" argues against reading into the de-

portation section more than Congress has itself written. *United States* v. *Atchison T. & S. F. R. Co.*, 220 U. S. 37, (1910).

Indeed, in construing an antecedent of the present statute, this Court said:

> "If Congress meant that past membership (in the United States) of no matter how short duration or how far in the past, was to be a cause of deportation the purpose could have been clearly stated. The section does not bear this import." *Kessler* v. *Strecker*, 307 U.S. 22, 29 (1939).

The clear statement of purpose which Congress thereafter enacted in the amendments contained in the Alien Registration Act of 1940, 54 Stat. 673, 8 U.S.C. 137 (1946), to overcome the effect of the *Kessler* decision it could have, but did not, adopt in the Internal Security Act of 1950 64 Stat. 987, 50 U.S.C. 781, to provide identical criteria for exclusion and deportation.

Rather, however, in its subsequent enactment, the Immigration and Nationality Act of 1952,[2] 66 Stat. 163, 8 U.S.C. 1251(a)(6) Congress stated:

> "This class has been *clarified to make it clear* that aliens who are not excludable *under the law existing at the time of entry* because of past membership in the proscribed classes are not to be deportable because of such past membership . . ." S. Rep. 1137, 82nd Cong., 2nd Sess. 22 (1952).

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[2] Respondent has conceded here that petitioner cannot be deported under the 1952 Act (Memorandum on Petition for Writ of Certiorari 5), and he has administratively so ruled as to aliens in a like position. See *In the Matter of H.*, Interim Decision No. 794, decided by the Board of Immigration Appeals May 1, 1956.

The Immigration Service advised the Congress with reference to S. 716 (the bill which later became the 1952 law) that section 241(a)(6) [8 U.S.C. 1251(a)(6)] would be:

> "helpful in resolving many legal questions as to the deportability of aliens who have been in the United States for many years, were lawfully admitted, and have not, subsequent to entry, committed any proscribed acts."[3]

It is, therefore, obvious that the Immigration Service itself recognizes, as did Congress, that the prior law (the Internal Security Act) does not call for deportation in the instant case. We believe the dissent below correctly concludes that there is nothing to show that Congress changed its mind. Congress opposed deportation here in 1940 and again in 1952. This construction likewise should be adopted as its view in the intervening period of 1950-1952 in conformity with this Court's admonition to resolve doubtful statutes against deportation. *Fong Haw Tan* v. *Phelan*, 336 U.S. 6, 10 (1948).

Finally, an analysis of the content of the two clauses in Section 22 of the Internal Security Act indicates that the majority below confused the time sequence of membership within the proscribed classes with the enumeration of the classes.

As the dissenting opinion of Judge Washington below states (R-58):

> "Section 4(a) refers to Section 1(2) only to incorporate 'the classes of aliens enumerated' therein, and the classes of aliens are enumerated only in subsections (A) through (H) inclusive—not in the pre-

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[3] This analysis of the Immigration Service was lodged with the Librarian of this Court in connection with the case of *Lehmann* v. *United States ex rel. Carson* (No. 72, October, 1956 Term).

amble *which relates merely to time.* (Emphasis supplied.) Section 4(a) specifies its own time period for membership for purposes of deportation, whereas the preliminary matter of (2) states another time period for membership for purposes of exclusion. To read the exclusion time period as a nullification or amendment of the deportation time period is unjustified in the absence of plain language; here the language used clearly shows that no such implied repeal or amendment was intended."

The view of the Fifth Circuit is identical to that of the dissenting opinion. *Berrebi* v. *Crossman*, 208 F. 2d. 498. Moreover, this Court's language in *Galvan* v. *Press*, 347 U.S. 522, 525, n. 2, suggests agreement with this position. The dissenting opinion of Mr. Justice Harlan in *Rowoldt* v. *Perfetto*, *supra*, expressly states that the section here under consideration "provides for deportation of aliens who *at the time of entry or thereafter* were members of . . . the Communist Party of the United States."[4]

The foregoing analysis clearly establishes that Section 22 does not provide for the deportation of aliens who had been lawfully admitted to the United States, as was the petitioner, for their past membership, prior to such entry, in a foreign Communist Party.

II. The Legislative History Confirms That Congress Did Not Intend to Deport Lawfully Admitted Aliens Because of Membership in a Proscribed Organization Prior to Entry.

Were there any doubt as to the provisions of the statute, it is dispelled by a review of the legislative history of the relevant clauses.

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[4] There is no distinction made between time of membership of the Communist Party of the United States and that of a foreign state. See Section 1(2)(C)(i) and (iv).

The basic act is the Anarchist Act of October 16, 1918, 40 Stat. 1012, 8 U.S.C. 137. It provided for the deportation of an alien who at any time after entry was found to have been at the time of entry, or who thereafter, became a member of a proscribed class. In *Kessler* v. *Strecker*, *supra*, this Court ruled that the statute authorized deportation only for aliens who were found to be members of the proscribed class at the time of the service of the warrant.

(A) *Alien Registration Act of 1940*

Congress thereafter amended the Anarchist Act by the enactment of Section 23 of the Alien Registration Act of 1940, 54 Stat. 670, 673, 8 U.S.C. 137.

The legislative development of this Section is instructive because it was this amendment as finally written which brought into the present statute the prefatory language which is set forth in Section 1(2).

The first legislative draft was H. R. 5138 in the 76th Congress. It had been approved by the House of Representatives, 84 Cong. Rec. 10,456 and favorably reported by the Senate Judiciary Committee, S. Rep. 1154, 76th Cong., 1st Sess., 84 Cong. Rec. 473.

In its original form, the bill made no distinction between exclusion and deportation. Its purpose was explicitly stated to "prevent admission and require deportation" of "any alien who, knowingly and voluntarily, at any time became a member of any one of the classes enumerated . . .", H. Rep. 994, 76th Cong., 1st Sess., page 3.

However, after extensive criticism of the bill, the favorable report of the Senate Judiciary Committee was withdrawn and the bill was recommitted to the Committee, 86 Cong. Rec. 473. The bill was revised by the Committee to distinguish between aliens who were to be excluded and those

who were to be deported. In its second report, S. Rep. 1721, 76th Cong., 3rd Sess., the Committee explained:

> "This is a provision of existing law, and prevents admission to certain classes of aliens who are anarchists, or believe in overthrow of the Government, or the necessity of assassination of Government officers. The amendment of the Senate Committee striking out section 2 and inserting the language of existing law, *was thought necessary to prevent hardship on aliens who may have, in the distant past, but who had renounced before coming to the United States, their membership in such classes.*" (Emphasis supplied.)

This report was also withdrawn, 86 Cong. Rec. 7649, and a new and final report issued by the Committee, S. Rep. 1796, 76th Cong., 3d Sess. But the congressional purpose to provide standards for deportation which differed from those for exclusion was reaffirmed. The report declared:

> "Section 23 amends the Act of October 16, 1918, which provides for the exclusion and deportation from the United States of aliens who are members of the anarchist and similar classes so as to provide that *no alien shall be admitted to the United States who has at any time been a member of such classes*, and also to provide that *any alien who has been a member of such classes at any time after his admission to the United States* (for no matter how short a time or how far in the past so long as it was after the date of entry) *shall be deported.*" (Emphasis supplied.)

This statement of purpose was repeated in the final Conference Report on the bill, H. Rep. 2683, 76th Cong., 3rd Sess., p. 9, and was renewed by its managers in the House and in the Senate.

Senator Connelly stated on behalf of the Senate Conferees, 86 Cong. Rec. 8343:

> "This provision refers to membership in communist or other societies which advocate the overthrow of Government by force or violence. In other words, *if an alien seeks entry into the United States and he is at the time* a member of a communistic or anarchistic organization which advocates the overthrow of Government, *we exclude him; but if he enters* anyway *and thereafter joins* one of these organizations, he is *deportable* and he can't avoid prosecution by saying 'well, I have quit,' because if he ever has been a member *since coming* into the country, he is deportable." (Emphasis supplied.)

Representative Hobbs made a similar explanation on behalf of the House Conferees, 86 Cong. Rec. 9032:

> "The pending measure amends the law so that it will provide that any alien *who at any time after his entry* into the United States shall have been a member of such organization shall be reported. Therefore, *after the bill becomes law* it will be perfectly clear that any alien who has ever been a member of such an organization *before coming* to this country cannot enter, or *if at the time of his entry or at any time thereafter* he has been even for one minute, he shall be deported." (Emphasis supplied.)

Thus it was that Section 23 of the Alien Registration Act changed the prefatory clause in the Anarchist Act of 1918 from:

> "That the following aliens shall be excluded from admission to the United States" to "Sec. 1. That any

alien who at any time shall be or shall have been a member of any one of the following classes shall be excluded from admission to the United States."

In the deportation section of the Act, it substituted the language "*was at the time of entering the United States or has been at any time thereafter*" for the phrase "*at any time after entering the United States is found to have been at the time of entry, or to have become thereafter.*"

(B) *Internal Security Act of 1950*

Nothing in the Internal Security Act of 1950 changed the wording which was brought into the Anarchist Act by the amendment in the Alien Registration Act. The paragraphing was changed to allow for the addition of two new sections in the exclusion portion. The original section one became subsection two (in section one) with the time period in its prefatory clause left untouched, although additional classes of aliens were added and defined in the subparagraphs.

It must be clear, then, that whatever reports make up the legislative history of the Internal Security Act, they add nothing to the construction of the particular phrases which are being examined here. It is enough to say that the Internal Security Act, as enacted, did not modify the time periods either for deportation or exclusion which had been adopted by prior statutes. The language which the respondent has cited from S. Rep. 2230, 81st Cong., 2nd Sess., and which the majority below cited from S. Rep. 1515, 81st Cong., 2nd Sess., must be regarded as inconclusive and not controlling here.

The Internal Security Act, however, effected a change in the Anarchist Act, which petitioner believes led the ma-

jority below to its erroneous decision. Subparagraph (2) (C) was amended to include by name "aliens who are members of . . . the Communist party . . . of any foreign state . . ."

The premise of the majority holding below is that the purpose and effect of that amendment is to dispense with the need for proof in deportation proceedings that a *foreign* Communist Party advocates the violent overthrow of the United States Government.

> "Under the 1940 Act, amending the 1918 Act, Klig was excludable because he had been a member of the proscribed class[5] and on that account was deportable upon a showing that the party to which he had belonged in fact advocated the violent overthrow of the Government. Under the 1950 Act, the need for such proof was dispensed with. Thus, Klig's past membership in the Communist Party of Canada predicated his deportability under Section 22 of the Internal Security Act of 1950." (R-54)

While that argument may have validity with regard to the Communist Party of the United States, it cannot be assumed to be so for foreign Communist parties. Respondent must concede the error of the ruling below in view of its position before this Court in *Galvan* v. *Press, supra.* In its Supplemental Memorandum on Writ of Certiorari, page 14, No. 407, October Term, 1953, respondent asserted:

> ". . . Congress was not merely declaring that the Party fell within the previously defined general class of organizations with unlawful objectives. *Congress was*

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[5] Respondent has conceded here that petitioner was not excludable at the time of his entries in 1941 and 1945 in the absence of any proof that the Communist Party of Canada advocated the violent overthrow of the United States Government. (Memorandum 5, Note 2)

creating a new class of deportable aliens:—those belonging to an entity which both advocates violence and at the same time is, and has been, under the direction and control of the 'Communist dictatorship of a foreign country' . . . The factor of control by the Soviet Union, stressed by the Committee on the Judiciary, is a factor new to our deportation legislation and cannot be disregarded . . ." (Emphasis supplied.)

That the respondent's position then is correct is amply supported by the legislative findings which accompanied the Internal Security Act. While in its previous enactments the attention of Congress was focused upon aliens who sought to overthrow the United States Government by force and violence, the Internal Security Act has far greater compass. It is concerned with the "world Communist movement" and the use of "treachery, deceit, infiltration, espionage, sabotage, terrorism, and any other means, to establish a Communist totalitarian dictatorship in the *countries throughout the world*" (emphasis supplied). Congress found that the danger to the United States was not limited to a direct threat of the violent overthrow of the Government, but also that "recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions . . ." Internal Security Act, supra, Section 2(1) and (15).

These findings, as the respondent has previously acknowledged, establish that effect of Section (2)(C) as it relates to the present proceedings is not to dispense with the need for proof of the nature of foreign Communist parties, as the majority below assumed, but to establish a new, broader category of aliens who were thereafter to be

excluded from the United States. Petitioner's last admission to the United States in 1945, obviously did not bring him within the exclusion requirements of a statute enacted five years after his entry.

The majority below therefore was in error in its assumption that petitioner was excludable at the time of his 1941 or 1945 entry. Although language in the Board of Immigration Appeals decisions suggests that he was (R-43), respondent below made no such claim, and he has admitted here that there was no such showing, *supra*.

Conclusion

The short of the argument is that Congress has consistently applied one standard for aliens which it sought to exclude and another for aliens which it sought to deport. So it is not at all incongruous, as Judge Washington pointed out, for Congress to deny admission to former Communists no matter how far distant their membership. But different considerations apply to deportation of former members of foreign Communist parties, who have been lawfully admitted to the United States. For it is one thing to be a Communist in a foreign country prior to entering the United States, and another to become one after residence here. The former, as Mr. Justice Harlan suggested in *Rowoldt*, benefit at least from the ameliorating provisions in the present Immigration and Nationality Act, at 66 Stat. 186, while the latter do not. It would surely be incongruous now to say that Congress sought to apply equal standards to both when under the present statute, as respondent has conceded (Memorandum-5) "one in the petitioner's position could not now be deported . . ."

For the reasons set forth, it is respectfully submitted

that the petitioner is not deportable and that the judgment of the court below should be reversed.

JACK WASSERMAN,
DAVID CARLINER,
Attorneys for Petitioner,
Warner Building,
Washington, D. C.

WASSERMAN & CARLINER,
Of Counsel.

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